In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. 422

RANCO INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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TABLE OF CONTENTS.

TABLE OF AUTHORITIES

Cases.

Statutes.

Constitution.

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Ranco Inc., petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on April 27, 1955 (petition for rehearing denied June 30, 1955), granting enforcement of an order of the National Labor Relations Board issued against petitioner.

OPINIONS BELOW.

The findings of fact, conclusions of law, and order of the National Labor Relations Board are reported at 109 NLRB 998 (R. 130-138).[1] The judgment of the Court below is reported at 222 F. (2d) 543. (It is also attached to the certified copy of the Joint Appendix, following

[1] "R" citations in this petition are to the pages of the printed Joint Appendix filed in the Court below, nine copies of which have also been filed in this Court. Exhibits of the General Counsel are designated "G. C. Ex." and the petitioner's exhibits (Respondent in the proceedings below) are designated as "Resp. Ex."

page 142a, as are the Petition for Rehearing and the order of the Court below denying rehearing.)

JURISDICTION.

The judgment of the Court below was entered on April 27, 1955. Petition for Rehearing was duly filed and was denied on June 30, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and Section 10(e) of the National Labor Relations Act as amended (29 U. S. C. 160).

QUESTION PRESENTED.

Where Petitioner is charged only with having denied Union representatives an opportunity to distribute literature on its premises, where Petitioner had a long-standing rule prohibiting distribution of literature on its premises by non-employees (which rule was uniformly enforced as to all types of distributions), where Petitioner freely permitted its employees to distribute literature of all kinds both within the plant and within the confines of its property, where both pro-union and anti-union literature was distributed on its property by its employees, and where there was an area immediately outside the plant gates where non-employee organizers could and did effectively distribute union literature, did Petitioner violate Section 8(a)(1) of the National Labor Relations Act by prohibiting the distribution of literature on its parking lot by non-employee union organizers?

STATUTE INVOLVED.

National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151 *et seq.*), insofar as is here pertinent, provides:

> *"Rights of Employees.*
>
> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> *Unfair Labor Practices.*
>
> SEC. 8. (a) It shall be an unfair labor practice for an employer * * *
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;"

STATEMENT OF THE CASE.

I. THE FACTS.

A. Background of Petitioner's Literature Distribution Rule, and Its Application.

For many years prior to January, 1953, petitioner had a rule in effect at its Delaware, Ohio, plant which provided that:

> "Delaware Plant employees are permitted to distribute literature on Company property, *but not on Company time.*" (G. C. Ex. 2; R. 14a.)

This rule was first posted in the Delaware plant about November 29, 1950 and remained posted after that date (R. 14a-15a, 56a).

The Board found that the rule was applied indiscriminately to all non-employees who desired to distribute literature of any kind on petitioner's property, and that it was not directed at Union literature (Resp. Ex. 1A, 1B; R. 15a, 104a-105a). For example, the Board found that the petitioner denied a request by non-employee representatives of the Ladies Auxiliary of the American Legion and the Veterans of Foreign Wars to sell Buddy Poppies at the guard houses (within the confines of its property), and that petitioner suggested to them that employees undertake that task (R. 104a-105a).

When a non-employee representative of the UAW-CIO wrote the Company in January, 1953, and requested permission to "distribute Union literature on Company property," the petitioner denied it that permission, referring specifically to its "long standing policy" as being "to restrict distribution of literature of any sort to Company representatives and employees of the plant" (G. C. Ex. 4; R. 16a, 105a-106a).

That answer gave rise to the proceedings which are at issue here.

B: The Physical Layout of Petitioner's Property Is Such That Non-Employee Union Organizers Can Make and Have Made Effective Distribution of Union Literature at Petitioner's Main Gates.

Petitioner's Delaware plant is located just inside the city limits of Delaware, Ohio, a city of 12,000 population (R. 24a, 26a, 101a). It is located 1.7 miles from the center of the city. The plant premises are enclosed by a fence and cover some 28 to 30 acres of land (R. 101a-102a). The plant buildings are located on the northern portion of the property, and the general parking lot in which the hourly-

paid employees park is located east of the plant buildings (G. C. Ex. 5, R. 17a).

After parking in the parking lot, employees enter the plant building by passing through either one of two guard house gates located in the front and back of the plant. These guard house gates are necessary for the purpose of identification, as the employees are required to wear identification badges (R. 33a).

It is important to note that all employees must enter the premises from the highway through the so-called West gate (25 feet wide) and may leave either through the West gate or through the East gate (36 feet wide). The two gates are separated by a grass area 30 feet in width (G. C. Ex. 5, R. 17a, 102a).

(1) There Is an Area Thirty Feet in Depth Between the Plant Gates and the Public Highway on Which the Union Organizers May Distribute Union Literature.

The East and West gates through which all employees must pass are located 30 feet south of U. S. Route 42 (G. C. Ex. 5; R. 17a), leaving an area of 30 feet in depth between the highway and the plant gates over which all employees must pass upon entering or leaving the plant property (R. 102a).

The Board found that UAW-CIO organizers (non-employees) distributed Union literature to employees on at least 25 different occasions in the area between the plant gates and the highway (R. 73a-74a, 106a). The Board also found that UAW-CIO organizers (non-employees) at times engaged in the distribution of Union literature as far as 30 feet inside the gates (R. 106a).

(2) Traffic Regulations Enforced by Petitioner and the State Highway Patrol Require That Employees Stop Their Automobiles Before Entering U. S. Route 42 When Leaving the Plant Property.

The record shows, and the Board found, that there are "Stop" signs located 21 feet from the East gate and 15 feet from the West gate in Petitioner's driveways (G. C. Ex. 5; R. 61a, 104a). These "Stop" signs are regular state highway signs and were furnished by the Highway Department. They require that employees leaving the plant property through either the East or West gate come to a stop before entering U. S. Route 42 (R. 61a-62a). The State Highway Patrol polices Route 42 where it passes Petitioner's property and enforces the state law which requires that employees entering the highway from the plant property observe the "Stop" signs (R. 62a, 104a).

The record also discloses that Petitioner made continuous efforts to "get (the employees) to cooperate * * * to come to a full stop before entering Route 42" (R. 62a) and that it had received "pretty good cooperation" (R. 72a). This was affirmed by the Board's finding that only about 10% of the cars failed to stop (R. 104a).

(3) The Traffic Conditions Created by Petitioner's Employees Leaving the Plant Give Non-Employee Organizers Ample Opportunity to Effectively Distribute Union Literature.

The Board found that at shift-change time, traffic jams up between the plant gates and Route 42.[2] As a result, automobiles stop in the driveway or in the 30-foot area outside Petitioner's property, where non-employee union representatives have distributed Union literature on at least 25 occasions (R. 74a, 106a).

[2] UAW-CIO organizer Peters testified that as many as 20 cars would line up in each lane (R. 76a).

C. Effective Distribution of Union Literature Was Made By Employees on Petitioner's Property.

The Board found that a number of Petitioner's employees distributed union literature from time to time without hindrance on Petitioner's premises (R. 104a). The record kept of the employees who distributed literature on Company property is Resp. Ex. 2, which shows that Petitioner's employees distributed union literature on plant property on at least seven (7) different calendar days from March 31, 1953 through June 2, 1953 (R. 65a-66a). Literature was distributed at the guard gates both by employees favoring and by employees opposing the Union (R. 93, 104a).

In addition to distributing Union literature on the plant premises, many of Petitioner's employees further publicized the UAW-CIO's cause by wearing UAW-CIO tee shirts and UAW-CIO badges in the plant during working hours (R. 104a). These tee shirts and badges were supplied by the UAW-CIO and Petitioner freely permitted its employees to wear such badges and tee shirts within the plant.

The Board's findings thus reflect a situation in which the petitioner accorded to all its employees the full measure of their statutory right to self-organization.

II. THE BOARD'S DECISION AND ORDER.

Relying primarily on *NLRB v. Le Tourneau Co.* 324 U. S. 793, the Trial Examiner held that petitioner's refusal to permit *non-employee* union organizers to distribute union literature on its parking lot constituted "an unreasonable impediment to self-organization, and an interference, restraint and coercion of employees rights guaranteed in Section 7 of the Act." (R. 100a-113a and particularly R. 112a.)

Board Members Murdock and Rodgers adopted the Trial Examiner's ruling that petitioner had violated Section 8(a)(1) of the Act (R. 130a-132a). Chairman Farmer and Member Peterson concurred with Members Murdock and Rodgers, but wrote a concurring opinion in which they emphasized that the General Counsel had the burden of proving that the Petitioner's distribution rule made it "impossible or unreasonably difficult for the union to distribute organizational literature to the employees entirely off the employer's premises." (R. 130a-135a.)

Board Member Beeson dissented on the ground that on the facts found by the Board, there was "no serious impediment to the employees' right to secure information." (R. 135a-137a.)

The Board ordered petitioner to cease and desist from prohibiting the distribution of Union literature by union representatives on its parking lot except pursuant to reasonable regulations or controls not of such character as to deny them access to employees for the purpose of effecting such distribution (R. 132a).

III. THE ORDER OF THE COURT BELOW.

The Court of Appeals for the Sixth Circuit enforced the Board's Order without opinion. However, in its judgment, it held that the Board properly applied the principles of decisions in *NLRB v. Monarch Machine Tool Company*, 210 F. (2d) 183, 184-187 (C. A. 6), certiorari denied 347 U. S. 967; *NLRB v. Lake Superior Lumber Co.*, 167 F. (2d) 147, 150 (C. A. 6); *NLRB v. Le Tourneau Company of Georgia*, 324 U. S. 793, 797, 798. (A copy of its judgment is set forth as Appendix A.)

REASONS FOR GRANTING THE WRIT.

1. THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISIONS OF THE CIRCUIT COURTS FOR THE TENTH, FIFTH AND NINTH CIRCUITS.

The decision of the Court below conflicts with the decision of the Court of Appeals for the Tenth Circuit in *National Labor Relations Board v. Seamprufe*, 222 F. (2d) 858 (May 5, 1955), the decision of the Court of Appeals for the Fifth Circuit in *National Labor Relations Board v. Babcock & Wilcox*, 222 F. (2d) 316 (May 10, 1955), and the decision of the Court of Appeals for the Ninth Circuit in *National Labor Relations Board v. Monsanto Chemical Company*, _____ F. (2d) _____, 36 LRRM 2506 (July 27, 1955). In all these cases, the Courts refused enforcement of orders virtually identical to that herein on facts very similar (or more favorable to the Board) to those in the instant case.[3]

(a) The Seamprufe Case.

In *Seamprufe*, as in the instant case, the plant was located on a 25-acre tract of land on the outskirts of a city of 6000 population, and the employees involved rode to and from work in privately owned automobiles which they parked on Company property. The Company permitted its employees to distribute literature on its property, but refused permission to non-employee union organizers to distribute literature in its parking lot.

The Trial Examiner there, as in the instant case, found that it was "virtually impossible" to distribute union

[3] The Board has already petitioned for certiorari in the *Babcock & Wilcox* and *Seamprufe* cases (Nos. 250 and 251, respectively, on the October, 1955 Term docket of the Court). In its brief to the Court in Case 250, it seeks certiorari on the basis of conflict with the decision sought herein to be reviewed. (pp. 8-9 of Board's Petition in No. 250.)

literature off company property, and based on the rationale of the *Le Tourneau* case, concluded that Seamprufe's distribution rule constituted an "unreasonable impediment to the freedom of communication essential to the exercise of its employees' right of self organization," and that the Company by enforcing such rule violated Section 8(a)(1) of the Act.

In *Seamprufe*, as in the instant case, the Board adopted the Trial Examiner's findings and conclusions without modification. However, the Circuit Court of Appeals for the Tenth Circuit denied enforcement of the Board's Order.

The Court there found three basic errors in the decision of the Board. The Court concluded:

> (1) That the doctrine of the *Le Tourneau* case was not applicable, and that the facts involved brought the case within that part of the decision of the Court of Appeals for the Seventh Circuit in *Marshall Field & Co. v. NLRB* (C. A. 7) 200 F. (2d) 375, "which denied non-employees access to company property in the absence of a showing of restricted accessibility amounting to a handicap."
>
> (2) That the Board had failed to recognize the fundamental distinction between the rights of employees or those who represent them in collective bargaining to enter upon an employer's property, and the rights of non-employee union organizers, who have no relationship whatsoever to either the employees or the employer, to enter upon said property.
>
> (3) That the Board's finding of "inaccessibility" was not justified by the facts. In this connection the Court stated as follows:
>
> "The Board found special circumstances of inaccessibility. But we do not think that conclusion is legally justified by the facts. True, the union organizers could not contact the employees at the

entrance or exit to the company property, but these circumstances did not insulate the employees from the union organizers. Unlike the employees of a lumber or mining camp who live and work on company property isolated from outside contacts, as in *N.L.R.B. vs. Lake Superior Lumber Corp., supra, the employees here lived in or near a small city and were easily accessible to union solicitors.* There was no impediment to union solicitation off company property amounting to a deprivation of the right of self-organization." (Emphasis ours.)

It is important to note that the Court in *Seamprufe* held that although the union organizers *could not* contact the employees at the entrance or exit to the company's property there was no impediment to union solicitation amounting to a deprivation of the right of self-organization, while in the instant case the Court below sustained the Board's finding of "inaccessibility" even though the non-employee union organizers *could and did* contact up to 90% of the petitioner's employees on an area immediately outside of its gates on some 25 separate occasions, and even though employee proponents of the Union could and did contact *all* the employees on the plant property at will.

(b) The Babcock & Wilcox Case.

The facts in *Babcock & Wilcox* were almost identical with those detailed above in the *Seamprufe* case. There again the Board held that the Company's distribution rule was an "unreasonable impediment" to self-organization, and that by enforcing that rule the Company violated Section 8(a)(1) of the Act.

The Court of Appeals for the Fifth Circuit denied enforcement of the Board's Order. In denying enforcement the Fifth Circuit held, as did the Tenth Circuit in *Seam-*

prufe, that there was a fundamental distinction between the rights accorded under the Act to employees and to non-employees who may seek to represent them; and that the *Marshall Field* case and not the *Le Tourneau* case was dispositive of the issue involved.

(c) The Monsanto Chemical Company Case.

In *Monsanto Chemical Co.*, the situation was almost parallel to that in *Seamprufe* and *Babcock & Wilcox*. There the Court of Appeals for the Tenth Circuit reviewed carefully the pertinent decisions of this Court and the various Circuit Courts, and for the reasons given by the Courts of Appeals for the Tenth and Fifth Circuits in *Seamprufe* and *Babcock & Wilcox* denied enforcement of the Board's Order. It specifically distinguished the *Le Tourneau, Lake Superior Lumber*, and *Monarch Machine Tool* decisions relied upon by the Court below in the instant case.

2. THE DECISION BELOW INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

The decision below presents an issue of law which is important in the administration of the National Labor Relations Act. The frequency with which this question has arisen is demonstrated by the number of recently-decided cases relating to this issue. (See page 9, *supra*.)

In its Petition for Certiorari to this Court in No. 250 of the current docket (*NLRB v. Babcock & Wilcox*), the Board itself urges the point here made by petitioner (pages 13-14 of the Board's Petition in No. 250).

The question here presented is therefore one of federal law which has not been, but should be, settled by this Court.

3. THE COURT BELOW DECIDED THE CASE ERRONEOUSLY BY RELYING ON DECISIONS NOT APPLICABLE TO THE FACTS IN THIS RECORD.

We do not have the benefit of any written opinion by the Court below. However, its judgment entry shows that it relied solely on *NLRB v. Le Tourneau Co. of Georgia*, 324 U. S. 793, *NLRB v. Lake Superior Lumber Co.*, 167 F. (2d) 147, and *NLRB v. Monarch Machine Tool Co.*, 210 F. (2d) 183. The foundation for its decision was an erroneous one and its decision therefore wrong.

(a) The Le Tourneau Decision Is Not Applicable.

In *Le Tourneau*, the Board itself had stated the issue as follows:

> "* * * *the sole question* confronting us *is whether, under the circumstances of the instant case*, to the extent that the rule prohibits distribution of Union literature *by employees* on parking lots, it constitutes such a serious impediment * * * that the rule gives way." (54 NLRB 1253, at 1260.) (Emphasis ours.)

The Board thereupon found that the *suspension of two employees* for violating the rule was violative of the Act.

Mr. Justice Reed, who wrote the opinion in *Le Tourneau*, later stated with reference to it that:

> "*It has never been held that where employees do not live on the premises of their employer a union organizer has to be admitted to those premises.* The present situation differs from the employer-controlled areas where employees both live and work in that here union organizers may solicit the employees on the streets or in their homes or at public meeting houses within a few miles of their employment." *NLRB v. Stowe Spinning Co.*, 336 U. S. 226, at 243. (Emphasis ours.)

That this Court's affirmance of the Board order in *Le Tourneau* did not decide the issue here present is clearly shown by the Board's brief to this Court in that case (No. 452, October Term 1944), in which the Board stated:

> "The facts in the instant case do not present and the Board did not consider the question which would arise if Union representatives who were not employed at the plant sought to distribute literature on the parking lots." (Page 29, footnote 17 of Board's Brief.)

(b) The Lake Superior Lumber Decision Is Clearly Inapposite.

Lake Superior Lumber involved a lumber camp 18 miles from town. The employees remained at the camp seven days each week. The Company severely restricted visitation rights by Union representatives. Justice Reed's comment about *Le Tourneau*, quoted at page 13, *supra*, shows that a "mill-town" situation cannot be equated with the facts here present.

(c) The Decision In Monarch Machine Tool Company Is Not Controlling.

In *Monarch Machine Tool*, the employer had in effect a *blanket prohibition* against distribution of literature on its premises by *anyone* (employees as well as non-employees). The Sixth Circuit there relied primarily on *Le Tourneau, supra*, and *Republic Aviation Co.*, 324 U. S. 793, both of which cases deal only with restrictions upon activities by "employees" on the employer's premises (210 F. (2d) 183, 186-187).

As has been shown earlier herein, and as the Board expressly found, employees in the instant case were permitted the full exercise of their right to distribute Union

literature on Company premises, and freely exercised that right.

4. THE DECISION OF THE COURT BELOW VIOLATES THE PETITIONER'S RIGHTS UNDER THE FIFTH AMENDMENT.

As has been shown earlier herein, the effect of the decision below is to accord to non-employee Union representatives rights beyond those granted by the petitioner to other outside solicitors, such as the Women's Auxiliary of the American Legion. The effect of the Court's decision is to require petitioner to grant to these non-employee Union organizers a discriminatory use of its property. Such a ruling violates the Fifth Amendment of the United States Constitution.

Insofar as employees on the premises are concerned—the situation presented in *Le Tourneau*—they are present as invitees. But insofar as non-employees are concerned, the Court's judgment below would convert them from "trespassers" to invitees or permittees, over the objections of the property owner, the petitioner.

The only decision of this Court under the Act which considered a situation even close to that here presented was that of *NLRB v. Stowe Spinning Co.*, 336 U. S. 226 (1949).

In *Stowe Spinning*, a "company-town" situation was involved. The outside Union organizer (Harris), offered to pay the social organization which was permitted use of the employer-owned post office building the usual fee for rental of the building. The rental agreement was made, but the employer (owner of the building) then caused the social organization to rescind the permission—"because Harris was a textile (union) organizer."

In enforcing the Board's order, this Court did so on the limited basis that:

> "(The Board) found that the refusal by these respondents was unreasonable *because* the hall had been given freely to others and because no other halls were available for organization. * * * What the Board found, and *all we are considering here, is discrimination.* The decree should be modified to order respondents to refrain from any activity which would cause a Union's application to be treated on a different basis than those of others similarly situated."
>
> *NLRB v. Stowe Spinning Co.*, 336 U. S. 226, at 233.

That situation is quite the converse of the case here presented. Here, the Board itself has found that no discrimination exists. Yet it orders that discrimination be practiced *in favor of the Union* as against organizations such as the American Legion.

As was once stated by Mr. Justice Jackson:

> "The essence of our free Government is 'leave to live by no man's leave, underneath the law'—to be governed by those impersonal forces which we call law. * * *
>
> Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give up."
>
> *Youngstown Sheet & Tube Co. v. Sawyer, et al.*, (*Steel Seizure* case), 343 U. S. 579, at 654 and 655 (1952).

CONCLUSION.

For the foregoing reasons, it is respectfully submitted hat this petition for certiorari should be granted.

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APPENDIX A.

Judgment of the Court of Appeals.

(Filed April 27, 1955.)

This cause came on to be heard on the petition of the National Labor Relations Board for enforcement of its order directing the respondent company to cease and desist from prohibiting the distribution of union literature by union representatives on the company's parking lot, except pursuant to reasonable regulations or control of such character as not to deny them access to the company's employees for the purpose of distributing such literature; and directing the respondent to rescind its plant rule concerning such distribution on its parking lot at its plant in Delaware, Ohio, except pursuant to reasonable regulations of such character as not to deny union representatives access to its employees for the purpose of distributing its literature;

And it appearing, upon a review of the record as a whole, that there is substantial evidence to support the findings of fact of the board;

And it appearing further that, in our judgment, the board properly applied the principles of decisions in the following cases, *N. L. R. B. v. Monarch Machine Tool Company*, 210 F. (2d) 183, 184-187 (C. A. 6), certiorari denied 347 U. S. 967; *N. L. R. B. v. Lake Superior Lumber Co.*, 167 F. (2d) 147, 150 (C. A. 6); *N. L. R. B. v. LeTourneau Company of Georgia*, 324 U. S. 793, 797, 798;

The petition of the labor board for enforcement of its order is granted as prayed by it.